

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1996 SESSION

**FILED**  
March 27, 1997  
Cecil Crowson, Jr.  
Appellate Court Clerk

HORACE JONES, )  
 )  
Appellee )  
 )  
V. )  
 )  
STATE OF TENNESSEE, )  
 )  
Appellant. )  
 )  
 )  
 )

No. 02C01-9510-CR-00330

SHELBY COUNTY

HON. BERNIE WEINMAN,  
JUDGE

(Post-Conviction)

For the Appellant:

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OPINION FILED: \_\_\_\_\_

AFFIRMED

William M. Barker, Judge

## OPINION

The appellant, Horace Jones, appeals the dismissal of his post-conviction petition filed in the Criminal Court of Shelby County. The trial court summarily dismissed appellant's *pro se* petition because it was filed outside the applicable statute of limitations. Finding no error in the trial court's ruling, we affirm the dismissal of the petition.

Appellant's only issue on appeal is whether his post-conviction petition is time-barred by the applicable statute of limitations. Therefore, a brief procedural history is necessary to evaluate his claim.

Appellant was convicted of first degree murder and sentenced to life imprisonment in 1979. On direct appeal to this Court, his conviction and sentence were affirmed. See State v. Horace Jones, No. 117 (Tenn. Crim. App. at Jackson, December 5, 1980). Permission was sought for appeal to the Tennessee Supreme Court, but denied on February 2, 1981. Appellant filed his first post-conviction petition, alleging ineffective assistance of counsel, in the early 1980's. The trial court denied relief and that ruling was upheld by this Court. See Horace Jones v. State, No. 12 (Tenn. Crim. App. at Jackson, December 16, 1982). In 1992, appellant filed a petition for habeas corpus relief alleging that improper jury instructions denied him due process. The petition was treated as one for post-conviction relief and dismissed for improper venue. That action was affirmed by this Court. See Horace Jones v. State, No. 02C01-9402-CC-00021 (Tenn. Crim. App. at Jackson, June 21, 1995). The appellant has also pursued habeas corpus relief in the federal courts.

This most recent post-conviction petition was filed by appellant on May 16, 1995. It alleges errors in the trial court's instructions to the jury and ineffective assistance of counsel in failing to obtain relevant evidence pertaining to his theory of self-defense. Upon motion of the State, the trial court dismissed the petition finding that it was filed after the statute of limitations had expired.

Under the mandate of the now-repealed Post-Conviction Procedure Act, the statute of limitation applicable to appellant's post-conviction claims was three years. Tenn. Code Ann. §40-30-102 (repealed 1995). That three-year period began running on July 1, 1986, the effective date of the statute, and the last date on which appellant could have filed such a petition was July 1, 1989. See e.g. State v. Mullins, 767 S.W.2d 668, 669 (Tenn. Crim. App. 1988); Smith v. State, 757 S.W.2d 683, 685 (Tenn. Crim. App. 1988); State v. Masucci, 754 S.W.2d 90, 91 (Tenn. Crim. App. 1988); and Abston v. State, 749 S.W.2d 487, 488 (Tenn. Crim. App. 1988). Appellant's current petition was filed in May of 1995, almost six years after the statute had expired. Therefore, the trial court properly dismissed appellant's petition.

We are mindful that *pro se* petitions should not be routinely dismissed without the appointment of counsel and an evidentiary hearing. Moreover, if the availability of relief cannot be *conclusively* determined from a *pro se* petition and the accompanying records, the petitioner must be given the aid of counsel. Allen v. State, 854 S.W.2d 873, 875 (Tenn. 1993) (citing Swanson v. State, 749 S.W.2d 731 (Tenn. 1988)). The record before us demonstrates conclusively that appellant has not presented a colorable claim and neither counsel nor an evidentiary hearing were necessary.

Appellant challenges the jury instruction given by the trial court defining premeditation and deliberation, stating that such instruction was subsequently invalidated by the supreme court in State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992). It is true that the supreme court in Brown admonished lower courts about the confusion which arises from instructions stating that premeditation could be formed in an instant and advised that the practice be abandoned. Id. However, this holding has never been interpreted to apply retroactively, nor has it been held to create a new constitutional rule. See e.g. Lofton v. State, 898 S.W.2d 246, 249-50 (Tenn. Crim. App. 1994); Leo Drew v. State, No. 02C01-9507-CC-00180, slip op. at 3 (Tenn. Crim. App. at Jackson, January 31, 1996); Jessie Lafrantz Jackson v. State, No. 01C01-

9412-CR-00427, slip op. at 15 (Tenn. Crim. App. at Nashville, December 19, 1995); Timothy Wayne Peters v. State, No. 03C01-9409-CR-00331, slip op. at 4 (Tenn. Crim. App. at Knoxville, October 30, 1995), perm. to appeal denied (Tenn. 1996); Richard H. Austin v. State, No. 02C01-9310-CR-00238, slip op. at 6 (Tenn. Crim. App. at Jackson, May 3, 1995). Thus, this ground for relief is barred by the statute of limitations. Since it does not announce a new constitutional rule with retroactive application, it is not a proper ground for relief under Burford v. State, 845 S.W.2d 204 (Tenn. 1992). See Sands v. State, 903 S.W.2d 297, 301-02 (Tenn. 1995).

Appellant also alleges the ineffective assistance of trial counsel. We cannot consider this issue because it has been previously determined. A court is precluded from considering any ground which has been previously determined. Tenn. Code Ann. §40-30-111 (repealed 1995). A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. Tenn. Code Ann. §40-30-112(a) (repealed 1995). This ground was raised and adjudicated in appellant's first post-conviction petition in which he received a full evidentiary hearing. See Horace Jones v. State, No. 12, slip op. at 3 (Tenn. Crim. App. at Jackson, December 16, 1982). Although appellant's factual contention is different in this petition, appellant may not relitigate a previously determined issue by presenting additional factual allegations. Cone v. State, 927 S.W.2d 579, 582 (Tenn. Crim. App. 1995), cert. denied, \_\_\_ U.S. \_\_\_, 117 S.Ct. 309, 136 L.Ed.2d 226 (1996).

Appellant's claim that the jury instructions on reasonable doubt and moral certainty were constitutionally infirm is waived. This issue could have been raised in an earlier proceeding, but was not. Appellant has given no reason to justify his delay in raising it. There is a presumption of waiver when a ground for relief was not raised in any prior proceeding. Tenn. Code Ann. §40-30-112(b)(1) (repealed 1995). The supreme court has directed us to evaluate waiver using an objective standard under which a petitioner is bound by the action or inaction of his attorney. House v. State, 911 S.W.2d 705, 714 (Tenn. 1995), cert. denied, \_\_\_ U.S. \_\_\_, 116 S.Ct. 1685, 134

L.Ed.2d 787 (1996). We must consider the issue waived for failure of appellant's counsel to raise this issue in a prior proceeding.

Finding that the appellant's petition is barred by the applicable statute of limitations and that he presents no ground for exception to that statute, we affirm the dismissal of the post-conviction petition without the appointment of counsel and an evidentiary hearing.

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William M. Barker, Judge

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Gary R. Wade, Judge

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David G. Hayes, Judge